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MICHAEL PROVIDENTE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - EL MONTE

MICHAEL PROVIDENTE,

Plaintiff,

vs.

KEN WELDON, individually and in
his capacity as Chief of Police; TOM
ARMSTRONG, individually and in
his capacity as the Assistant Chief of
Police; STEVE SCHUSTER,
individually and in his capacity as a
Police Captain; CRAIG SPERRY,
individually and in his capacity as a
Police Captain; SANTOS
HERNANDEZ, individually and in
his capacity as a Police Lieutenant;
MARTY PENNEY, individually and
in his capacity as a Police
Lieutenant; Lieutenant ROBERT
ROACH, , individually and in his
capacity as a Police Lieutenant and
ROES 1 THROUGH 10
INCLUSIVE;

Defendants

CASE NO.: CV10-02200 DMG (RZx)

**PLAINTIFF'S OPPOSITION TO THE
CITY OF EL MONTE'S MOTION TO
DISMISS PLAINTIFF'S COMPLAINT
PURSUANT TO FED.R.CIV.P 12(b)(4),
12(b)(5) & 12(b)(6)**

DATE: JUNE 28, 2010
TIME: 9:30 A.M.
CRTRM: 7
JUDGE: DOLLY M. GEE

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff MICHAEL PROVIDENTE (hereinafter "Plaintiff") hereby responds to Defendant, CITY OF EL MONTE'S, (hereinafter "Defendant(s)") Motion to Dismiss for failure pursuant to Federal Rule of Civil Procedure 12(b)(4), 12(b)(5) AND 12(b)(6). Defendants' motion should be denied because Plaintiff's Complaint was sufficiently served on all appropriate parties and the Complaint is sufficiently specific to apprise Defendants of the substance of the claims being asserted. Also, Plaintiffs claim is not time-barred.

Further, Defendants' motion should be denied because Defendants seek to have the Court require Plaintiff to spell out every possible detail of his claims in the pleading stage of this action. This amounts to dilatory conduct by Defendants. Plaintiff's Complaint is sufficient pursuant to the requirements of Federal Rule of Civil Procedure 8. However, if the Court is inclined to grant Defendants' motion, Plaintiff respectfully requests an opportunity to amend his Complaint.

II. STANDARD OF REVIEW

The federal rules require only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). A motion to dismiss, pursuant to Rule 12(b)(4) and (5) permit the dismissal of an action for insufficiency of service and insufficiency of service of process. A motion to dismiss, pursuant to Rule 12(b)(6), tests the legal sufficiency of the claims stated in the complaint. It "is viewed with disfavor and is rarely granted." *Gilligan v. Jamco Develop. Corp.*, 108 F. 3d 246, 249 (9th Cir. 1997). Indeed, dismissal under Rule 12(b)(6) is proper only in "extraordinary" cases. *United States v. White*, 893 F. Supp. 1423, 1428 (C.D. Cal. 1995) (quoting *United States v. Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981)).

1 In reviewing a Rule 12(b)(6) motion, the Court must accept as true all
 2 material allegations in the complaint, as well as reasonable inferences to be drawn
 3 from them. *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir. 1998). A claim will
 4 survive an attack under Rule 12(b)(6) if it “may be supported by showing any set
 5 of facts consistent with the allegations in the complaint.” *Bell Atlantic Corp. v.*
 6 *Twombly*, 550 U.S. 544 (2007). In other words, a claim may not be dismissed
 7 based solely on a court's supposition that the pleader is unlikely “to find
 8 evidentiary support for his allegations or prove his claim to the satisfaction of the
 9 factfinder.” *Id.* at n.8. With ambiguous inferences, the Court must adopt
 10 whichever inference supports a valid claim. *Columbia Natural Resources, Inc. v.*
 11 *Tatum*, 58 F. 3d 1101, 1109 (6th Cir. 1995).

12 If dismissal is granted, leave to amend is “only denied if it is clear that
 13 amendment would be futile and ‘that deficiencies of the complaint could not be
 14 cured by amendment’.” *Lilley v. Charren*, 936 F. Supp. 708, 713 (N.D. Cal. 1996),
 15 (quoting *Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir.1980) (per
 16 curiam)).
 17
 18

19 **III. LEGAL ARGUMENT**

20 **A. PLAINTIFF HAS PROPERLY SERVED DEFENDANTS WITH** 21 **THE COMPLAINT**

22 Defendants ask the Court to dismiss this lawsuit for insufficient service of
 23 process. However, in the instant action, which was filed on March 25, 2010, there
 24 exists no issue as to service of process. All individual Defendants were served with
 25 the Summons and Complaint on March 30, 2010.

26 Furthermore, Defendants assertion that Plaintiffs complaint is duplicative --
 27 is unsupported by case law. Plaintiff's lawsuit is different from that of *Providente*
 28 *vs. City of El Monte* Case No. CV09-3327 DMG because it contains different

1 causes of action (less than that against the City). While the underlying facts are
2 similarly related, the case is not duplicative and should not be dismissed.

3 Defendant cites to two cases regarding duplicative cases, stating that
4 “plaintiffs generally have no right to maintain two separate actions involving the
5 same subject matter at the same time in the same court and against the same
6 Defendants”: *Walton v. Eaton Corp* (3rd Cir. 1977) 563 F.2d 66, 70 and *Russ v.*
7 *Standard Insurance Co*, (9th Cir. 1977) 120 F.3d 988,990. However, both of these
8 cases do nothing to support Defendants claims, and in fact, these cases deal with
9 allowing leave to discontinue to cure an *untimely demand for a jury trial*. First,
10 Plaintiff is not asking the Court for dismissal in order to cure an untimely demand
11 for jury trial. Second, *Walton* might actually favor Plaintiffs claim whereby the
12 Court held that “consolidating two substantially identical complaints causes no
13 harm ...provided that that the district court insures that Plaintiff did not use the
14 incorrect procedure of filing duplicative complaints for the purpose of
15 circumventing the rules pertaining to *..demand for trial by jury*”. *Id* at 71.

16 Here, Plaintiff brings a new complaint against different parties. Plaintiff has
17 served the individual Defendants with the new Complaint and as such, has satisfied
18 any service of process issues. As such, Defendants Motion to Dismiss should be
19 dismissed. However, if the Court disagrees, Plaintiff requests leave to amend.

20 **B. PLAINTIFFS CLAIMS ARE NOT TIME-BARRED**

21 Defendants Motion to Dismiss claims that the causes of action against the
22 individual Defendants are time barred as a result of the statute of limitations.
23 However, where the running of the statute cannot be determined from the face of
24 the complaint, a motion for summary judgment is the proper procedure. See
25 *Supermail Cargo, Inc. v. United States* (9th Cir. 1995) 68 F3d 1204, 1206; and
26 *AVCO Corp. v. Precision Air Parts, Inc* (11th Cir. 1982) 676 F2d 494,495.
27 **Moreover, the fact that dates alleged in the Complaint are beyond the**
28 **statutory period is not enough to support a Rule 12(b) (6) dismissal. Dismissal**

1 can be granted “only if the assertions of the complaint, read with the required
 2 liberality, would not permit the plaintiff to prove that the statute has been
 3 tolled”. *Cervantes v. City of San Diego* (9th Cir. 1993) F 3d 1273,1275. Here,
 4 Defendants have brought an improper motion to dismiss for an issue that can only
 5 be decided on summary judgment. Also, Plaintiff has pled sufficient facts to
 6 overcome any statute of limitations issues. Therefore, Defendants motion to
 7 dismiss must be denied.

8 **1. Plaintiff’s Claims are Within the Two-Year Statute of Limitations**

9 Plaintiffs complaint alleges the following against all Defendants: 1.
 10 Violation of Ralph Civil Rights Act Cal. Code Section 51.7; 2. Violations of Bane
 11 Act Cal. Civil Code 52.1; 3. Union Busting: Cal Govt Code 3302,3309.5, 3502,
 12 3506, 3508; 4. Free Speech Violation Cal Constitution Article I; 5. 42 USC 1201;
 13 Americans with Disabilities Act; 6. Civil Rights and Free Speech 42 USC 1983.

14 Plaintiffs Complaint also alleges that each individual Defendant was acting
 15 “individually and within the course and scope of [their employment]” ; “under
 16 color of state law, within the course and scope of his employment, and as an
 17 official policy-maker for the City” and that each Defendant was a “City
 18 Department Head, Manager, or Supervisor” and that they are “vested with policy-
 19 making authority over actions such as the ones at issue herein” [See Complaint,
 20 Pages 3 to 7]. Ken Weldon- acting as a Chief of Police, Tom Armstrong- acting as
 21 Assistant Chief of Police; Steve Schuster acting as Police Captain; Craig Sperry
 22 acting as Police Captain; Santos Hernandez acting as Police Lieutenant; Marty
 23 Penny acting as Police Lieutenant; and Robert Roach acting as Police Lieutenant --
 24 - all Defendants participated in the termination of Plaintiff on April 15, 2008
 25 [Complaint, Page 15]. Moreover, Plaintiff asserts that he has submitted two tort
 26 claims- of which the Defendants have not responded to (in March and April of
 27 2008) [Complaint, Page 15].
 28

1 In order to create a general sense of the discrimination and harassment that
2 has taken place against Plaintiff, Plaintiff recited factual history as far back as 1997
3 in his Complaint against Defendants. However, the important factual recitation
4 begins in April 2009- the time when Plaintiff was terminated. A statute begins to
5 run when Plaintiff "knows or has reason to know of the injury which is the basis of
6 the action" *Norco Construction, Inc. King County*, (9th Cir.1986) 801 F 2d. 1143,
7 1145. Under federal law, the limitations period commences with notice. A cause of
8 action generally accrues when a plaintiff knows or has reason to know the injury of
9 which is the basis of his her action. In a discrimination action, the limitations
10 period is triggered by the decision constituting the discriminatory act. *Delaware*
11 *State College v. Ricks* (1980) 449 U.S. 257-258. Here, the injury of which is the
12 basis of Plaintiffs complaint is the termination. Thus, the limitations period began
13 when Defendants (all of them) acted in concert and terminated Plaintiff—April 15,
14 2008. See *Chapman v. Homco* (5th Cir. 1989) 886 F.2d 756, 758.

15 Plaintiff did not know that he would sustain the injury- termination- before
16 the date of his termination. Moreover, after his termination on April 15, 2008,
17 Plaintiff submitted tort claims. Therefore, Plaintiff knew or had reason to know of
18 his injury at the *earliest*—April 15, 2008, the date he was terminated. Thus,
19 Plaintiff brought his lawsuit against the individual defendants on March 25, 2010
20 and served them on March 30, 2010- within the two-year statute of limitations.

21 As for Defendant, Craig Sperry, despite Plaintiff recitation of the factual
22 history that Plaintiff has with Sperry, Plaintiffs statute of limitations did not begin
23 to toll against Sperry until the date of Plaintiffs injury- his termination on April
24 2008. As for Defendant, Marty Penny, despite Plaintiff recitation of the factual
25 history that Plaintiff has with Penny, Plaintiffs statute of limitations did not begin
26 to toll against Penny until the date of Plaintiffs injury- his termination on April
27 2008. As for Defendant, Santos Hernandez, despite Plaintiff recitation of the
28 factual history that Plaintiff has with Hernandez, Plaintiffs statute of limitations did

1 not begin to toll against him until the date of Plaintiffs injury- his termination on
2 April 2008.

3 As for Defendant Robert Roach, despite Plaintiff recitation of the factual
4 history that Plaintiff has with Roach, Plaintiffs statute of limitations did not begin
5 to toll against Roach until the date of Plaintiffs injury- his termination on April
6 2008. As for Defendant Schuster, despite Plaintiff recitation of the factual history
7 that Plaintiff has with Schuster, Plaintiffs statute of limitations did not begin to toll
8 against him until the date of Plaintiffs injury- his termination on April 2008. As for
9 Weldon, despite Plaintiff recitation of the factual history that Plaintiff has with
10 Chief of Police Weldon, Plaintiffs statute of limitations did not begin to toll against
11 him until the date of Plaintiffs injury- his termination on April 2008. As for Tom
12 Armstrong, the statute of limitations did not begin to toll until April 2008;
13 however; Plaintiffs recitation of factual encounters with Armstrong fall within the
14 statute of limitation since his discriminatory conduct and remarks took place on
15 March 26, 2008.

16 Even though Plaintiff can demonstrate that all of the actions complained of
17 in his Complaint are well-within the statute of limitations, the fact that dates
18 alleged in the Complaint are beyond the statutory period is not enough to support a
19 Rule 12(b) (6) dismissal. Therefore, Plaintiff respectfully requests that Defendants
20 Motion to Dismiss be dismissed.

21 **C. PLAINTIFF HAS SATISFIED THE PLEADING REQUIREMENT**
22 **PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 8.**

23 Plaintiff's Complaint is sufficiently specific to apprise Defendants of the
24 substance of the claims asserted. "A pleading that states a claim for relief must
25 contain . . . a short and plain statement of the claim showing that the pleader is
26 entitled to relief." Fed. R. Civ. P. 8. Defendants seek to have the Court require
27 Plaintiff to spell out each and every possible detail of his claims in the pleading
28 stage of this litigation. This is inappropriate and unnecessary. Plaintiff's statement

1 of facts and separately pled causes of action are sufficient pursuant to the
2 requirements of Rule 8.

3
4 **IV. CONCLUSION**

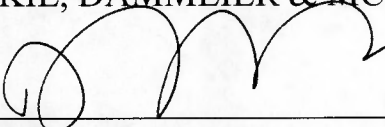
5 For all the reasons discussed above, Plaintiff requests that the Court deny
6 Defendants' Motion to Dismiss in toto. However, if the Court is inclined to grant
7 any part of Defendants' motion, Plaintiff respectfully requests an opportunity to
8 amend his Complaint.

9
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11 Dated: June 7, 2010

Respectfully Submitted,

LACKIE, DAMMEIER & MCGILL APC

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13
14 By:



Michael A. McGill, Esq.

Carolina Veronica Diaz, Esq.

Attorneys For Plaintiff, Michael Providente